IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1224 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE
HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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VITHALBHAI MATHURBHAI - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR BS SUPEHIA for Appellant(s) : 1,
MR KP RAWAL, APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

and

HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

Date : 22/02/2007

ORAL JUDGMENT
(Per : HONOURABLE MR.JUSTICE A.L.DAVE)

The appellant came to be tried for the offence of kidnapping/abduction and rape of minor S by Sessions Court, Kheda (Camping at Anand) in Sessions Case No.198 of 1998. He was convicted for the offence of kidnapping/abduction under Section 363 and 366 of I.P.C. and sentenced to undergo R.I. for a period of 7 years and to pay a fine of Rs.1,000/-, in default, R.I. for one year. For the offence of rape, he was convicted under Section 376 and sentenced to undergo life imprisonment and to pay a fine of Rs.5,000/- and in default, to undergo R.I. for three years. All the sentences were ordered to run concurrently and the accused was given benefit of set-off.

2. The facts of the prosecution case are that the victim was staying with her parents at Navinagri at village Thamna around 22nd May, 1996. It is alleged that on that date, the appellant had kidnapped her from local guardianship of her parents and thereafter, repeatedly committed rape on her. It is alleged that at that time, she was aged 13 years. It is also alleged that after enticing the prosecutrix from the guardianship of her parents, the appellant took her to different places and continued to have physical relationship with her and thereby, committed repeated rapes. F.I.R. in this respect was lodged by the mother of the prosecutrix - Jiviben on 23rd May, 1996 before Umreth Police. Offence was registered and investigation started. As the Investigating Officer found sufficient material

against the accused – appellant, he filed chargesheet in the Court of J.M.F.C., Umreth who, in turn, committed the case to the Court of Sessions and Sessions Case No.198 of 1999 came to be registered.

2.1 The Sessions Court, on basis of evidence led by the prosecution, concluded that the prosecution was successful in establishing charges against the accused appellant and recorded conviction and passed sentence, as stated in earlier part of this judgment.

3. Learned advocate Mr. Supehia has taken us through the record and proceedings and has, in all fairness, conceded to the fact that it is not possible for him to assail the judgment on conviction part. He, however, submits that if the case and the evidence is seen, it is clear that the appellant and the prosecutrix have lived together as husband and wife at different places for quite some time and there does not seem to be any *mens rea* in the act of the appellant although statutorily he can be said have committed the offence. Mr. Supehia submitted that the appellant's financial condition is conspicuous from the fact that he could not engage an advocate for his defence either before the Trial Court or before this court and was represented by an appointed advocate at the trial as well as at the appellate level. The appellant has not even been able to pay the fine. Mr. Supehia, therefore, submitted that the Trial Court has awarded disproportionately high sentence for both the

offences and the case of the appellant may be considered only on quantum of punishment aspect.

4. We have heard learned APP. He tried to support the judgment and the order of the Trial Court.

5. We have perused the record and proceedings. We find that the evidence led by the prosecution in form of deposition of Dr. Thakarsinhbhai Karshanbhai (Exh.8), the medical certificate (Exh.10) and the F.S.L. report which clearly indicate involvement of the appellant in the offence of rape. The deposition of the prosecutrix S at Exh.12 also establishes involvement of the appellant in the offences, considering the age of the prosecutrix. We are, therefore, satisfied that the learned advocate for the appellant is justified in not assailing the judgment on conviction aspect and we, therefore, confirm the conviction.

6. Coming to the question of quantum of punishment, the Trial Court has awarded Rigorous Imprisonment for 7 years for the offence punishable under Section 363 and 366 of I.P.C. The punishment prescribed under Section 363 is imprisonment of either description for a term which may extend to 7 years and fine whereas under Section 366 it is imprisonment of either description for a term which may extend to 10 years and fine. It appears that the appellant is a labourer and had prayed for an

appointed advocate for his defence before the Sessions Court which was granted to him and post-conviction also, before this court also, he preferred appeal through jail and prayed for assistance of an appointed advocate. This speaks volumes about the financial condition of the appellant. It transpires from the evidence of the prosecutrix that after leaving with the appellant, the couple went to Talod where they stayed for six months as husband and wife. The appellant was working as a labourer at Talod. Thereafter, they went to another village, the name of which she does not remember where they stayed for about a month. Thereafter, they went to Surat. There again, they stayed for some time and then they went to Himatnagar. At all these places, they stayed together as husband and wife. Of course, we are conscious of the fact that she was aged around 13 years initially when the incident occurred and, therefore, her conduct on consent part is of no consequence on question of guilt of the appellant but for deciding the quantum of punishment, this aspect is certainly relevant. The appellant's conduct does not indicate that the act was committed out of lust. The accused and the prosecutrix have moved & stayed together openly as husband and wife. The prosecutrix also seems to have accepted the relationship. She has never made any complaint to any one. She has not tried to run away & ditch the appellant. Both of them are tribals and it is common that couples migrate from place to place for livelihood.

6.1 The appellant is in jail since 14th May, 1998. Keeping the facts and circumstances of the case in mind, we are of the view that ends of justice would be served if the appellant is awarded a sentence of Rigorous Imprisonment for a period of 7 years for the offence punishable under Section 363 and 366 and fine is reduced to Rs.100/- and in default, to undergo S.I. for 7 days. So far as offence punishable under Section 376 is concerned, we are of the view that ends of justice would be met if he is awarded imprisonment for the period already undergone by him and if the fine is reduced to Rs.500/-, in default, to undergo S.I. for 15 days.

7. We, therefore, partly allow the appeal. The conviction of the appellant is confirmed. The sentence awarded to the appellant for the offence punishable under Section 363 and 366 of I.P.C. is altered to Rigorous Imprisonment for a period of 7 years with a fine of Rs.100/-, in default, he is ordered to undergo S.I. for 7 days. So far as offence punishable under Section 376 of I.P.C. is concerned, the appellant is awarded imprisonment for the period already undergone by him and fine is reduced from Rs.5,000/- to Rs.500/-, in default, he is ordered to undergo S.I for 15 days.

(A.L. Dave, J.)

(Bankim N. Mehta, J.)

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